Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-7106-97
LWKuo/RSGoldstein

date: FEB 1 1999

to: Problem Resolution Program
Southern California District (Laguna Niguel)
Attention: Lois Kemerer

from: Southern California District Counsel (Laguna Niguel)

subject: Timeliness of taxpayer's claim for refund
Taxpayer: [redacted]
SSN: [redacted]

This memorandum is in response to your request for an advisory opinion regarding the taxpayer's claim for refund.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUES

1. Whether the taxpayer filed a refund claim with respect to [redacted], and, if so, whether that claim was timely.

2. Whether the Service should withhold the refund due to the taxpayer with respect to his [redacted] tax year because his claim for refund for [redacted] was time-barred when the Service erroneously credited his [redacted] overpayment of tax to his [redacted] tax liability.

CONCLUSIONS

1. The taxpayer timely filed a refund claim with respect to the overpayment of his [redacted] tax liability.

2. No. On the facts provided, a court is likely to find that the taxpayer timely filed his [redacted] claim for refund.

FACTS

The taxpayer filed his [redacted] return on [redacted]. On [redacted], the taxpayer filed an amended return for [redacted] seeking to reduce the amount of royalty income he reported on his original return. The Las Vegas Appeals Office reviewed the amended return and reduced his royalty income in [redacted]. This reduction resulted in a net operating loss for [redacted] ("[redacted] NOL").

According to the Service's records, on [redacted] the taxpayer filed an amended return for [redacted], on which he carried back the [redacted] NOL to his [redacted] tax year, creating an overpayment in the amount of $[redacted] for [redacted][1] The taxpayer claimed a refund of this amount. The Service reviewed the refund claim and reduced it to $[redacted].

On [redacted], the Service credited $[redacted] of the claimed [redacted] overpayment against an outstanding existing tax liability for [redacted] and $[redacted] against an outstanding existing tax liability for [redacted]. Later, it was determined that the taxpayer did not owe the additional $[redacted] for [redacted]. Thus, the taxpayer is currently overpaid with respect to his [redacted] tax year by that amount.

District Counsel Advice

In September 1997, you requested advice from District Counsel as to whether this overpayment should be refunded to the taxpayer. In a memorandum, dated November 24, 1997, we advised you that the overpayment should not be refunded because the taxpayer did not timely file his [redacted] refund claim. By memorandum dated [redacted], District Counsel again advised that the taxpayer's [redacted] refund claim was not timely. As

---

[1]During a [redacted] meeting attended by the taxpayer's accountant and attorney ([redacted] and [redacted]), District Counsel attorneys ([redacted] and [redacted]), and the District's Problem Resolution Office ([redacted] and [redacted]), the taxpayer's representatives alleged that the taxpayer filed his refund claim in [redacted], and not in [redacted] as shown on the Service's records.

discussed in both memoranda, under I.R.C. § 6511(d)(2), the taxpayer's claim for a refund of an overpayment of his [redacted] taxes (resulting from the carryback of the [redacted] NOL to [redacted]) was due on or before [redacted]. Inasmuch as the facts set forth in the prior advices and the requests for such advice indicated that the taxpayer filed his [redacted] refund claim on [redacted], we concluded that the refund claim for [redacted] was not timely.

[redacted] Meeting

During a [redacted], meeting, the taxpayer presented the Service with a package of documents. Included in this package was (1) a copy of an unsigned, undated, handwritten Form 1040X for [redacted] seeking a carryback of the [redacted] NOL to the [redacted] tax year and (2) a copy of a letter, dated [redacted], from the revenue agent to the taxpayer's accountant. In the letter, the revenue agent stated:

> I have received a response from District Counsel, Laguna Niguel, regarding the statute consideration and timely filing of the NOL carryback to [redacted]. The response I received indicates that the process of filing the carryback is one action based on the original claim and is considered timely. Therefore, I am allowing the claim based on the Form 1040X filed [redacted].

At the meeting, the taxpayer's representatives claimed that the taxpayer did not file the [redacted] amended return on [redacted], but, on [redacted] the same date he filed his [redacted] amended return. The taxpayer claims that his now deceased accountant prepared the [redacted] and [redacted] amended returns and that these returns were mailed to the Service at the same time. The taxpayer also alleges he has witnesses to the mailing of the returns.

The Witnesses

The taxpayer has provided letters from two witnesses. The first letter, dated [redacted], is from a gentleman who has been a friend and neighbor of the taxpayer since [redacted]. (A copy of the letter is attached as Exhibit A). The witness is a certified public accountant who had an office in the same building as the taxpayer's deceased accountant in [redacted]. In his letter, the witness states that, in [redacted], the taxpayer asked him to review some returns prepared by the deceased accountant's office. The witness remembers seeing amended returns for [redacted] and [redacted]. The witness does not state what those returns said beyond stating that the returns "indicated a large anticipated refund." He concludes his letter by stating that the taxpayer told him that he mailed both returns to the Service.

The second letter, dated [redacted] is from a certified public accountant who was associated with the deceased accountant (A copy of the letter is attached as Exhibit B). The accountant alleges that he prepared the amended returns for [redacted] and [redacted]. He remembers the [redacted] amended return indicated a carryback of the [redacted] NOL to [redacted]. The accountant states that the [redacted] and [redacted] returns were prepared together and were filed together. The accountant, however, does not state when he prepared the returns, when the returns were filed, or if he saw the returns actually filed.

[redacted] Amended Return

The Service received the taxpayer's [redacted] amended return on [redacted]. This form was handwritten and signed by both the taxpayer and a return preparer (whose signature is illegible) with the following social security number: [redacted]. This is the deceased accountant's social security number. The social security number of the deceased accountant's associate is [redacted]. The amended return states, "Taxpayer elects to carry NOL forward." This statement in the filed return is inconsistent with the statement from the witness that the taxpayer requested an NOL carryback in the [redacted] amended return.

After receiving the amended return, the Service assigned a revenue agent to review the amended return. In the revenue agent's workpapers (Form 4700) dated [redacted] he indicates that the taxpayer wants to carryforward the [redacted] NOL, but that he did not make a proper election to do so. The revenue agent also asked the taxpayer to provide him copies of the prior year returns to see if the NOL could be carried back to the prior years. In [redacted] the revenue agent received copies of the prior year returns and saw that the entire [redacted] NOL would be absorbed in the prior years. The taxpayer subsequently requested formal Appeals consideration. The revenue agent's notes do not mention a [redacted] amended return (the [redacted] refund claim) claiming a carryback of the [redacted] NOL. The revenue agent does not remember any mention of such a return.

An appeals officer also reviewed the [redacted] refund claim. The appeals officer's notes indicate that he disallowed the claim to carryforward the [redacted] NOL because the taxpayer did not make an election to do so on his original [redacted] return. The appeals officer's notes do not mention any [redacted] amended claim. Although the taxpayer's accountant claims that he gave the appeals officer a new [redacted] amended return, the appeals officer does not remember seeing an amended return for [redacted] nor does he recall the taxpayer's accountant mentioning an amended return for [redacted]. The appeals officer dealt solely with the taxpayer's accountant.

[redacted] Amended Return

The Odgen Service Center received a Form 1040X for the taxpayer's [redacted] tax year on [redacted]. The amended return was typewritten and signed by the taxpayer and his accountant. The amended return states:

[redacted]

Attached to the amended return was a schedule of NOL carryback calculations, a copy of a Form 2297, a copy of the original [redacted] return and an unsigned copy of the [redacted] amended return filed on [redacted]. The amended return claims a refund of an overpayment of taxes resulting from the carryback of the [redacted] NOL to [redacted].

A revenue agent was assigned to review the [redacted] refund claim. The revenue agent dealt solely with the taxpayer's accountant. The revenue agent recalls that the accountant told her that he gave the [redacted] amended return to the appeals officer to file. The accountant told her that Exam did not allow the taxpayer's [redacted] NOL, and that the case was sent to Appeals. According to the accountant, Appeals allowed part of the NOL, but told the accountant that the NOL had to be carried back. The revenue agent did not think the [redacted] amended return was filed timely and expressed this to the accountant. The accountant disagreed, but he did not mention that a [redacted] amended return had been filed in [redacted].

In [redacted], the revenue agent sought advice from District Counsel on whether the mitigation provisions under I.R.C. §§ 1311-14 applied. In [redacted], District Counsel advised that these provisions did not apply in the taxpayer's case, but opined that the [redacted] refund claim filed in [redacted] was timely.

DISCUSSION[2]

The Service is required to refund any overpayment of tax to the person who overpaid such tax, if the person who made the overpayment timely filed a claim for refund or the applicable period for filing such claim has not expired. I.R.C. § 6402(a). However, the Service may, at its discretion, credit any overpayment of tax against any outstanding tax liability of the person who made the overpayment before refunding the balance of the overpayment. *Id.* If the Service credits an overpayment of tax against another pursuant to I.R.C. § 6402, the taxpayer is not entitled to a refund of such amount unless he establishes, within the applicable period, that he overpaid the second liability. *See generally, Donahue v. United States*, 33 Fed. Cl. 600 (1995); *Courtney v. Commissioner*, T.C. Memo. 1994-502, *aff'd. in an unpublished opinion*, 82 F.3d 429 (11th Cir. 1996); *Bojan v. United States*, 69 AFTR 2d 92-1280 (E.D. Mich. 1992).

Pursuant to I.R.C. § 6511(b), no credit or refund of an overpayment of tax shall be made after the expiration of the statute of limitations for filing a claim for refund unless a claim was filed by the taxpayer within such period. A claim for credit or refund of an overpayment of tax generally must be filed within three years of the time the return was filed or two years from the time the tax was paid, whichever period expires later. I.R.C. § 6511(a). For purposes of I.R.C. § 6511, a tax credited from another tax liability is considered paid on the date that the Service actually made the credit. *Donahue v. United States*, 33 Fed. Cl. at 605; *Urwyler v. United States*, 96-1 USTC ¶ 50,052 (E.D. Calif. 1996).

In the instant case, there is no dispute that the taxpayer has overpaid his [redacted] tax liability by $[redacted]. Further, this overpayment is the result of a [redacted], credit of that amount from the [redacted] tax module. Therefore, for purposes of the statute of limitations for filing a claim for refund or credit, the $[redacted] is deemed paid on [redacted]. Although the taxpayer filed a Form 1040X for [redacted], and not [redacted], he has continually requested that this amount be refunded to him. Further, since [redacted], the Service has treated his request as a claim for the amount that was credited from his [redacted] tax module to his [redacted] tax module. Therefore, the taxpayer has filed an informal, if not a formal, claim for refund of the [redacted]

---

[2]Although our discussion is limited to the $[redacted] credited against the taxpayer's [redacted] tax liability, the same analysis can be used with respect to the $[redacted] credited against the taxpayer's [redacted] tax liability and the balance of the overpayment, which we assume was refunded.

overpayment of tax. *See, e.g., United States v. Kales*, 314 U.S. 186, 194 (1941); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 862 (4th Cir. 1990); *First National Bank v. United States*, 610 F. Supp. 933, 937 (W.D. Ark. 1985). Moreover, inasmuch as the taxpayer has made his claim within two years of [redacted] it is timely.

Notwithstanding the above, you have requested our advice on whether the Service may withhold the [redacted] refund if the amount was erroneously credited from his [redacted] tax module to his [redacted] tax module. We, however, think it likely that, on the facts provided, a court would find that the taxpayer had timely filed a claim for refund for the [redacted] tax year, and that the credit, therefore, was not erroneous.

As stated above, a claim for credit or refund of an overpayment of tax generally must be filed within three years of the time the return was filed or two years from the time the tax was paid, whichever period expires later. I.R.C. § 6511(a). However, in the case of a claim for refund or credit attributable to a net operating loss, the taxpayer has, in lieu of the three year period prescribed in I.R.C. § 6511(a), three years after the time prescribed by law for filing the return (including extensions thereof) for the year of the net operating loss to file his claim for refund. I.R.C. § 6511(d)(2). Nevertheless, any credit or refund of any portion of tax made after the expiration of the limitations period for filing a claim for credit or refund is void unless a claim was filed within such period. I.R.C. § 6514(a)(1); *see also* Treas. Reg. § 301.6514(b)(1).

In this case, the taxpayer's [redacted] return was due on [redacted]. Thus, the taxpayer had until [redacted] to file his refund claim for [redacted].[3]

A claim for refund or credit generally is filed when it is received by the appropriate office of the Service. *See* I.R.C. § 6091(a); Treas. Reg. §§ 301.6091-1(a), (b)(1), and 1.6091-2. However, under certain conditions, a claim for credit or refund is deemed filed (*i.e.*, delivered to the Service) as of the date

---

[3]In our prior advice, we expressed the view that the [redacted] amended return filed on [redacted] was not timely. Although we continue to adhere to that view, your most recent request for advice recites facts not known to us previously. Specifically, the taxpayer has stated that he filed his [redacted] amended return in [redacted] and has presented circumstantial evidence to support his claim. Inasmuch as a claim filed in [redacted] would be timely, we are reconsidering our prior conclusion in light of this new information.

of a United States postmark date stamped on the cover (*e.g.*, an envelope). I.R.C. § 7502. Pursuant to I.R.C. § 7502(a)(2), a document contained in an envelope bearing a timely postmark, but received after the due date, will be deemed filed as of the United States postmark date if the envelope was properly stamped and addressed. Further, if the document is not received, but the taxpayer has a certified or registered mail receipt with respect to the item, the receipt is prima facie evidence that the document was delivered. I.R.C. § 7502(c).

The courts differ in their interpretation of I.R.C. § 7502. *See Carroll v. United States*, 71 F.3d 1228 (6th Cir. 1995), *cert. den'd.*, 518 U.S. 1017 (1996); *Climaco v. United States*, 95-1 USTC ¶ 50,243 (E.D.N.Y. 1995). Some courts interpret I.R.C. § 7502 narrowly: (1) Requiring actual delivery of the document to the Service and (2) only allowing a registered or certified mail receipt to establish delivery, if the Service has no record of receiving the document. *See, e.g., Carroll vs. United States*, 71 F.3d at 1228; *Washton v. United States*, 13 F.3d 49 (2d Cir. 1993). However, other courts, including the Court of Appeals for the Ninth Circuit, interpret I.R.C. § 7502 broadly: (1) Following the common-law mailbox rule (proof of a timely postmark creates a rebuttable presumption of timely receipt) and (2) allowing circumstantial evidence (other than a registered or certified mail receipt) to establish delivery. *See, e.g., Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992); *Estate of Wood v. Commissioner*, 909 F.2d 1155 (8th Cir. 1990).

Although the Service generally follows the narrow interpretation, it follows the broader interpretation in cases appealable to the Eighth Circuit. *Estate of Wood v. Commissioner*, AOD CC-1991-021 (Oct 22, 1991). At the time the Service articulated this position, the Court of Appeals for the Ninth Circuit had not decided whether or not it would follow the common-law mailbox rule and accept circumstantial evidence to establish delivery. Now, however, it is well established that the Court of Appeals for the Ninth Circuit follows the common-law mailbox rule and allows taxpayers to establish delivery through circumstantial evidence. *Anderson v. United States*, 966 F.2d at 487; *see, also, Lewis v. United States*, 144 F.3d 1220 (9th Cir. 1998).

In *Anderson*, the Service did not have any record of receiving the taxpayer's refund claim and the taxpayer did not have a postmarked envelope or mail receipt. When the Service told the taxpayer that it had not received the refund claim, the taxpayer mailed another return, which was received untimely. The district court allowed the following evidence to establish timely

delivery of the refund claim: (1) the taxpayer's testimony on witnessing a postal clerk stamping the envelope containing the return and (2) the testimony of a friend of a taxpayer who accompanied the taxpayer to the post office, waited in the car and saw the taxpayer leave the post office without the envelope containing the return. 966 F.2d at 491. The court found that this evidence established the date of the postmark, which date established that the taxpayer had mailed the amended return prior to the due date. *Id.* This created a rebuttable presumption that the Service had timely received the return. *Id.* Although the Service produced records of non-receipt to rebut this presumption, the court found the taxpayer's testimony credible and was not persuaded by the Service's evidence.[4] The Ninth Circuit upheld the district court's decision, finding that the decision "was, in essence, a credibility determination." *Id.* at 492.

On May 22, 1998, the Ninth Circuit clarified its opinion in *Anderson* in a case involving a claim for attorney fees. *See Lewis v. United States*, 114 F.3d at 1220. Finding the government liable for the taxpayers' attorney fees, the court held that,

> [t]he law of this circuit is clear. We go by the "mail box rule." Proper and timely mailing of a document raises a rebuttable presumption that the document has been timely received by the addressee. *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992). The rule applies to mailings by taxpayers to the Service. *Id.* Consequently, the Service knew that the Lewises had timely filed if Frank Lewis was truthful about when he had mailed the [filing extension] application.

Id. at 1222 (Emphasis added.) While the court acknowledged that the Service was not required to accept the taxpayer's unsupported word on this issue, it, nevertheless, concluded that the Service "needs more than a skeptical smile" to support its doubt of the taxpayer's credibility if the taxpayer has an unblemished reputation for paying taxes and produces circumstantial evidence supporting his word. *Id.* The court noted that,

> [t]he sure way of refuting the taxpayers' contention [of a timely mailing] was to produce the postmarked envelope. . . Once a letter is mailed, control of this vital evidence is completely in the hands of the Service. When the Service destroys or fails to keep

---

[4]The government also admitted to losing tax returns that had been mailed and delivered to the Service. 966 F.2d at 492.

the evidence, the Service must bear the adverse inference to be drawn. [*Id.*]

During the [redacted] meeting, the taxpayer claimed that he filed a handwritten [redacted] refund claim in [redacted] and that in [redacted], he filed a typewritten [redacted] refund claim. The typewritten claim was received by the Service on [redacted], and, thus, filed on that date. The Service has no record of receiving the handwritten claim, and the taxpayer does not have a certified or registered mail receipt to prove delivery occurred on [redacted].[5]

Inasmuch as the Service never received the handwritten claim for refund, the Service cannot refute the taxpayer's contention by producing the postmarked envelope. However, unlike in *Lewis*, the failure to produce the envelope should not draw a negative inference against the Service because, according to our records, the Service never had control of this vital information. The taxpayer also did not file his [redacted] return until [redacted]. Thus, the taxpayer's reputation for timeliness is tarnished. We also note that the taxpayer did not mention the handwritten amended return during the initial investigation of his claim by the revenue agent. Inasmuch as the revenue agent was concerned about the claim's timeliness, we think that the taxpayer would have notified the revenue agent of the existence of the handwritten claim at that time.

Further, unlike in *Anderson* and *Lewis*, the two witnesses identified by the taxpayer were not present when the amended return was allegedly mailed in [redacted]. Additionally, the statement of the second witness is inconsistent with other, more reliable evidence. Although the second witness remembers that the [redacted] Form 1040X he prepared in [redacted] indicated a carryback of the [redacted] NOL to [redacted] the [redacted] Form 1040X filed in [redacted] provides, "[the t]axpayer elects to carry NOL forward." Therefore, the Service probably has "more than a skeptical smile" to support its doubt that the taxpayer mailed the Service a claim for refund for [redacted] in [redacted].

Nevertheless, as stated above, we think a court bound by the law of the Ninth Circuit will conclude that this is not sufficient to establish that the taxpayer did not file his [redacted] claim for refund timely. That the taxpayer will be able to establish that the Service does lose returns, see *Anderson v. United States*, 966 F.2d at 492, negates some of the presumption created by the lack of any official record showing that a return

---

[5]Although the typewritten claim was not timely, the handwritten claim was timely, if it was postmarked in [redacted]

was filed in [redacted]. Further, the taxpayer does have witnesses who can testify that two returns were prepared in [redacted], if not mailed. That one of those returns was received and filed, probably negates any remaining presumption created by the lack of any official record showing that a return was filed in [redacted]. Therefore, in an effort to "due equity" and in the absence of any other evidence to refute the taxpayer's claim, the court will probably find that there was a claim for refund for [redacted] filed in [redacted] and that the credit from [redacted] to [redacted] therefore, was not erroneous.

RECOMMENDATION

Based on the foregoing, the taxpayer filed a timely claim for refund with respect to his [redacted] tax liability. Thus, to the extent that he overpaid his tax with respect to that liability, he is entitled to a refund. Further, we do not think that the Service would be sustained by a court on a claim that the taxpayer failed to timely file a claim for refund or credit with respect to his [redacted] tax liability. Accordingly, the Service should refund the requested overpayment of tax.

We have coordinated this advice with the National Office and they concur with our views. If you require further assistance in this matter, please call me with your questions. I can be reached at 360-3435.

HARRY M. ASCH
District Counsel

By: Richard S. Goldstein
RICHARD S. GOLDSTEIN
Assistant District Counsel